In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1324

ALLSTATE INSURANCE COMPANY,
Petitioner,

vs.

JOSEPH A. CANNATA,
Respondent.

On Petition for a Writ of Certiorari
To the Court of Appeal of the State of California,
First Appellate District, Division Three

Petitioner's Reply to Respondent's Brief

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SUBJECT INDEX

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INTRODUCTION

Preliminarily, petitioner wishes to criticize the Respondent's Brief in Opposition ("Respondent's Brief" or "Brief") in two respects. It contains a nineteen-page "Appendix" setting forth a "Statement of Facts" and a "History of the Case". Petitioner questions the propriety of this "Appendix" because it apparently was written in an attempt to convey an air of authenticity to its statement of the "facts" by interspersing numerous references to the record

below. However, neither party certified the record to this Court under the provisions of Rule 21 of the Supreme Court Rules. Thus, the Court is presented with a strongly argumentative version of the "facts" allegedly supported by transcript references, but *without the certified record* for purposes of verification by this Court. As will be pointed out in more detail below, several of respondent's "facts" are simply inaccurate. If respondent believed that his best means of opposing the petition was a comprehensive review of the evidence developed in the trial court, he should have certified the record to this Court for its objective inspection.

Secondly, among the referenced "facts" set forth in the Brief, there is material which appears to be directly and completely referenced to the record. But no citation is furnished for purposes of verification by the reader. See, for example, the quote attributed to Allstate's counsel appearing in the middle of page four of the Brief, as well as the alleged concession of Allstate's counsel appearing at the end of footnote three on page six.

It appears that respondent is attempting to create the illusion of a documented and fully referenced exposition of the facts in support of his opposition. Because of the absence of a certified record upon which verification of respondent's "facts" could be made, petitioner submits that the Appendix as well as those portions of the Brief relying thereon should be considered with caution.

I. THE LABOR ISSUE WAS TIMELY RAISED.

The theme of Respondent's Brief is that this is not a "labor case" and is therefore not subject to federal preemption. Respondent asserts that the labor issue did not appear until a few days before the trial (Respondent's Brief

p. 5) and that there was no evidence from which the jury could conclude that respondent was terminated for his pro-union activity or statements (Respondent's Brief p. 9). Finally, respondent accuses petitioner of suppressing the preemption issue until after judgment. In this connection, respondent tells this Court:

> "Petitioner, Allstate, never at any time before the judgment was rendered against it, challenged the jurisdiction of the state court or filed any document and/or pleading which inferred or alleged that the state court had no jurisdiction and/or that its jurisdiction was pre-empted (sic) by the National Labor Relations Act, . . ." (Respondent's Brief, p. 11a)

Respondent supports these assertions with false statements and quotations taken from context, sometimes with and sometimes without citation to the record which respondent has failed to bring before this Court. Rather than burden the Court with an extended rebuttal of the inaccuracies and distortions contained in Respondent's Brief, petitioner will address each of its major points, demonstrating with references[1] that respondent has grossly misrepresented the record in an effort to defeat this petition.

A. The Labor Issue Was in the Case from the Outset.

Respondent's primary argument that this case is not preempted rests upon a claim that the labor issue was manufactured by the petitioner and was never urged until after judgment. This claim is false. Aside from approximately 125 pages of testimony of over one-third of the witnesses who testified at trial, including respondent, regarding "Can-

1. Although petitioner eschewed what it considered the improper practice of citing to a record without its certification, respondent's use of this device requires appropriate references to the record in response.

nata's union activities and Allstate's policies regarding unions" (Opinion, p. 2), there were two documents placed into evidence showing that petitioner was aware of respondent's pro-union activity and that it was a material factor in the decision to terminate him.

One document, showing petitioner's awareness of respondent's pro-union activity, was designated at trial as *Plaintiff's* Exhibit 5-Z. This exhibit was a letter dated May 3, 1968 from respondent's immediate supervisor, John Crise, to the Regional Manager, Keller Potter, recommending respondent's termination for an unsatisfactory attitude because, *inter alia,* he had suggested that a union "might do a lot of good" at Allstate. (Vol. X, 1139-1140) This letter, written only 18 days prior to respondent's termination, was authored by the supervisor who recommended the firing to the manager who approved it (Vol. V, p. 39, Exhibit 5BB). Moreover, both Crise and Potter were present at and participated in respondent's termination interview (Vol. V, pp. 400-401, Exhibit 5CC).

Equally absurd is respondent's assertion that this letter and the labor issue did not arise during pre-trial discovery. The Crise letter to Potter was a part of respondent's personnel file (Exhibit 5), which was made available to him and copied by his counsel long before trial. Furthermore, in pretrial depositions respondent's counsel extensively examined witnesses, including John Crise and Clarence (Bud) Danen, about the letter and Cannata's pro-union activity. (Vol. X, p. 1139, 1140; Vol. XVI, 1701-1706, Deposition of John Crise, p. 26-29; Deposition of Clarence (Bud) Danen, p. 28-30). These depositions demonstrate that respondent knew about and took discovery on the Crise letter and the labor issue well *before* trial.

Another document evidencing petitioner's awareness of

respondent's pro-union activity and statements was a memorandum dated September, 1967 (approximately nine months before respondent's termination) reporting that Cannata "would be interested in organizing. Cannata's brother is a union organizer for unknown union group." (Defendant's Exhibit H). Respondent would have this Court believe that this was an inconsequential memorandum having no relationship to his termination. This contention is false.

The information contained in Exhibit H played a significant role in the decision to terminate respondent. Exhibit H was four pages of minutes of two meetings convened by the personnel department of the zone in which respondent worked to discuss union activity among Allstate personnel. (Vol. XIV, p. 1564-1572). Through respondent's examination of Allstate personnel, he established at trial that these meetings were attended by the very supervisors and managers who later made or approved the decision to fire him.[2] It was also established through the testimony of several witnesses that it was reported at the meeting that Cannata and another claim adjustor at Allstate would be interested in organizing a union at Allstate and that Cannata's brother was a union organizer. (Vol. XIV, pp. 1562, 1569, Vol. XVII, pp. 1828-1829). Thus, the evidence showed that only nine months before respondent's termination the persons who were later involved in the decision to terminate his employment heard it reported that he would be interested in organizing a union at Allstate. Therefore, the conclusion reached by the jury

2. The meetings were attended by, among others, Mr. Crise, respondent's immediate supervisor, who recommended his termination; Mr. Potter, the Regional Manager who approved respondent's termination; and Mr. Williford, the Regional Personnel Manager who also approved respondent's firing. (Vol. XIV 1572).

that respondent was terminated in material part for his pro-union activity or statements, was fully supported by the evidence.

B. Respondent Was Fully Aware of the Labor Issue Before the Trial and Introduced the Issue to the Jury.

Repeatedly protesting that "this was not a labor case," respondent claims that the preemption issue did not arise until after judgment when petitioner first raised it. The error of this claim is exposed by the remarks of respondent's counsel to the trial court and to the jury. During chambers discussions with the trial court prior to jury selection, respondent's counsel told the court that he had discovered evidence which showed that respondent was discharged for union activities or being favorable to a union:

> "Mr. Barbagelata: 'I would like to state something right now *so the defendant doesn't claim surprise when the time comes.* There is a strong indication in the evidence as I have discovered it through discovery . . . that they felt he favored union activity for adjust[o]rs.' (Vol. II, p. 72; emphasis added.)
>
> "Mr. Barbagelata: 'What I am saying is it may very well be that during the course of the trial, and perhaps I should do it now, to move the Court to—you see I don't like to do it, because I don't know what evidence is going to come out about it, but there is *some semblance of evidence in there that he was discharged for union activities or at least being favorable to a union.*'" (Vol. II, p. 73; emphasis added.)

In fact, at one point respondent's counsel told the trial court he was considering calling the former Regional Director of the National Labor Relations Board ("NLRB") as a witness:

> "Mr. Barbagelata: 'Now, I don't know if this Roy Hoffman of the National Labor Relations Board could be classified as an expert witness. He is the head of the National Labor Relations Board, and I would merely call him to interpret some law. . . . If for some reason the Court found that I needed the head of the National Labor Relations Board here to testify as to some portion of the National Labor Relations Act, I would want to be free to call him.'" (Vol. II, p. 82)

Respondent's claim that the union issue and the possible jurisdiction of the NLRB never came up until after judgment rings hollow in the face of statements to the Court that he was considering calling the Regional Director of the NLRB as a witness to interpret the law and to testify on some portion of the National Labor Relations Act ("Act").

Finally, and most importantly, it was respondent's counsel who first introduced Cannata's union activity into the case telling the jury that his pro-union activity and statements may have been one of the reasons for his termination. In his opening statement Mr. Barbagelata said:

> "So, you may find, the evidence may show to your satisfaction that because Joe did sympathize with the fact that perhaps a union might help some of the employees of Allstate, that perhaps this is one of the reasons they decided to get rid of him. And the evidence may show that." (Vol. III, p. 139.)

Having introduced the issue to the jury, and having stated that the evidence might show that respondent was terminated for sympathizing with unions, respondent can scarcely claim that this was an issue belatedly inserted into the case by petitioner.

C. Respondent's Contention That the Issue of Federal Preemption Was Not Raised in the Trial Court Until After Judgment Is Flatly Contradicted by the Record.

Respondent contends that "never, at any time before judgment was rendered against it" (Respondent's Brief, p. 11a) did Allstate file any document or pleading which alleged that the jurisdiction of the state court was preempted. This statement is false. On August 14, 1974, twenty-three days before the case was submitted to the jury, petitioner submitted its first memorandum in support of proposed jury instructions arguing that respondent's claims were preempted by the Act. Without quoting at length, petitioner's position was set forth in the second paragraph of the pleading:

> "Allstate contends that if it is established that plaintiff was discharged for pro-union activity, his termination claim is entirely preempted by the National Labor Relations Act, (the NLRA) and *the conduct for which plaintiff seeks redress is solely within the jurisdiction of the National Labor Relations Board (NLRB).* Therefore, this court is without power to award damages for plaintiff's discharge. (Clerk's Transcript, p. 797; emphasis added.)

Respondent answered with his own memorandum, which commences with a heading "Defendant's conduct is not subject to the jurisdiction of the National Labor Relations Board," and states:

> "Defendants would have the court believe that their actions in discharging plaintiff constitute an unfair labor practice subject to the National Labor Relations Act, 29 USC 158(a)(3) and thus this court is without jurisdiction to award damages to plaintiff based upon defendants' unfair labor practice." (Clerk's Transcript, p. 803.)

Respondent's memorandum was answered by another memorandum for petitioner, which was met by a five page reply from the plaintiff. In summary, within the twenty-three days before the verdict, four memoranda were submitted to the trial court on the question of preemption. In view of this record, respondent's statement to this court that no pleadings were filed before judgment which argued that the jurisdiction of the state court was preempted must be viewed as an attempt to distort the record.

It must be concluded from the above that (1) respondent was terminated, in material part for his pro-union activity or statements, a fact which was discovered by respondent's counsel well before trial; (2) that respondent introduced the labor issue into the case telling the jury in opening statement that the evidence might show he was terminated for union activity or sympathies; and (3) that the preemption issue was raised and argued to the trial court shortly after commencement of trial.

II. THE JURY'S SPECIAL FINDINGS AND THE COURT OF APPEAL'S OPINION MEAN WHAT THEY SAY.

A. The Jury's Special Findings Are Clear.

Respondent attempts to escape the clear import of the jury's special findings by arguing that they do not mean what they say. This attempt must fail in the face of the only logical reading to which they are susceptible.

First, it is clear what the parties and the trial court *meant* by the special interrogatories submitted to the jury. Petitioner proposed a special interrogatory[3] on the preemption issue as follows:

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3. Question No. 1 was "Did plaintiff hold a position as a supervisor or managerial employee with defendant when he was terminated?"

> "QUESTION NO. 2: Was plaintiff terminated, in whole or in part, because of *his* pro-union activity or statements?" (C.T. 993; emphasis added).

This clearly called for the jury to decide whether respondent's own pro-union activity or statements brought about his discharge. The Court, however, refused petitioner's proposed special interrogatories, and substituted its own parallel interrogatories for petitioner's nos. 1 and 2. At the end of defendant's special interrogatories the trial judge wrote "Refused—Lawrence A. Mana/Q1 & Q2—covered by interrogatories prepared by the court. . . ." (C.T. 994). Thus, it is clear that the trial judge intended to have the jury decide that which the petitioner wanted the jury to decide—whether respondent's pro-union activity or statements played a role in his discharge.

Second, the interpretation of the special finding suggested by plaintiff is illogical on its face. If the parties or the court had meant to have the jury decide whether the pro-union activities of *others* had played a role in plaintiff's discharge because of *his* failure to report them to management, the court simply would have asked that question.[4]

Finally, even if plaintiff's illogical and improbable meaning was to be ascribed to the jury's special finding, this case is still preempted under the arguable test set forth in *San Diego Building Trades v. Garmon,* 359 U.S. 236 (1959). The jury found that plaintiff was a non-managerial employee. The Court of Appeal further found that respondent's asser-

4. The meaning ascribed by plaintiff to this finding contains two unarticulated and highly improbable premises. The plain meaning, however, contains only one silent premise which logically arises from any critical reading—that it was petitioner's union activity in question. The only correct interpretation of the special finding is that the jury decided that plaintiff was discharged in material part for his own pro-union activity or statements.

tion that he was a supervisor "is without merit" (Opinion p. 8). It is a violation of §§ 8(a)1 and 8(a)3 of the Act to require a non-supervisor to report on the pro-union activity or statements of other employees. To discharge a non-supervisor for failing to carry on such illegal surveillance is also an unfair labor practice. *Izzi Trucking Co.*, 149 NLRB No. 108 (1964) *enfd.* 342 F2d 753 (1st Cir. 1965); *Goodyear Tire & Rubber Co.*, 159 NLRB No. 61 (1966) *enfd.* 394 F2d 711 (5th Cir. 1968)

B. The Court of Appeal's Opinion Is Clear.

Respondent is understandably uncomfortable with certain statements concerning the thrust of the evidence in the opinion of the Court of Appeal. The Court of Appeal, after a review of the entire record, determined (i) that the jury's special findings were supported by substantial evidence, and (ii) that in its review of the entire record there was evidence that Allstate was at least attempting to "chill", "if not in fact interfere with" employee Section 7 rights. (Opinion, page 7). Respondent is now asking this Court, without any record, to ignore the documented findings of the Court of Appeal. This suggestion makes a mockery of all standards of appellate review.

CONCLUSION

The Respondent's Brief reveals the desperation of his plight. He is unable to respond to the legal arguments contained in the petition, which upon documented findings of the Court of Appeal clearly mandate the application of the preemption rule. Respondent instead has chosen to flail at the jury's special findings and the Court of Appeal's determination that they were supported by the evidence. He also falsely accuses petitioner of inventing the preemption defense after the judgment. In support of this position he

attaches to his brief an Appendix replete with his selection of evidence from the record below and distorted argument purportedly based upon that evidence. This appears to be an attempt to overwhelm this Court with such a torrent of factual recitation as to induce it to turn from the petition and leave the parties in *status quo*. Petitioner is confident that this Court will perceive the pure legal issue of federal preemption presented in the petition and see the inherent inconsistency in the opinion of the Court of Appeal in failing to apply the doctrine of preemption to admittedly determined facts. This Court should grant the petition and order summary reversal of the judgment below.

Dated: May 26, 1977.

Respectfully submitted,

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